

IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF MISSOURI
 CENTRAL DIVISION

COMPREHENSIVE HEALTH OF)	
PLANNED PARENTHOOD GREAT)	
PLAINS, et al.)	
Plaintiffs,)	No. 16-CV-04313-BCW
)	October 1, 2018
v.)	Jefferson City, Missouri
)	CIVIL
PETER LYSKOWSKI, et al.)	
)	
Defendants.)	

TRANSCRIPT OF ORAL ARGUMENT
 BEFORE THE HONORABLE BRIAN C. WIMES
 UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic voice writing
 Transcript produced by computer

APPEARANCES

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1 October 1, 2018

2 (Proceedings began at 9:08 AM)

3 THE COURT: Good morning. Let the Court call the
4 case. This is Comprehensive Health of Planned Parenthood
5 Great Plains, et al, plaintiffs, versus Joshua D Hawley in his
6 official capacity as the Attorney General of Missouri, et al,
7 Case No. 16-CV-04313.

8 Can I have parties enter their appearance for the
9 record and I will start with the plaintiffs in this case.

10 MR. BENSON: Your Honor, Arthur Benson, Melissa
11 Cohen, and Emily Wales for the plaintiff. And Ms. Cohen will
12 be taking the lead.

13 THE COURT: Okay. And I'm sorry, Mr. Benson. The
14 last attorney you mentioned is?

15 MR. BENSON: Emily Wales, W-A-L-E-S, general counsel
16 for Planned Parenthood.

17 THE COURT: Okay. Thank you.

18 And for the defendants.

19 MR. SAUER: Your Honor, John Sauer on behalf of the
20 state defendants, Attorney General Hawley, and with me is
21 Emily Dodge and Joshua Divine from the Attorney General's
22 Office.

23 THE COURT: Okay. And Mr. Divine?

24 MR. DIVINE: That's correct, Your Honor.

25 THE COURT: Okay. Spell your name for me, sir.

1 MR. DIVINE: D-I-V-I-N-E.

2 THE COURT: Okay.

3 Well, the Court had set this matter for a hearing on
4 today's date, and we had a phone conference on Thursday to
5 establish this date based upon the motions filed with this
6 Court with respect to a temporary TRO/preliminary injunctive
7 relief sought by the plaintiffs in the case.

8 And so with that said, Ms. Cohen, would you like to
9 start?

10 MS. COHEN: Sure, Your Honor.

11 THE COURT: Thank you.

12 Ms. Cohen, we didn't have the opportunity in terms
13 of the briefing schedule in terms of reply so there may be
14 some questions I want to ask you up front, a few things,
15 because you didn't have the chance -- time didn't give us the
16 chance to reply.

17 MS. COHEN: Sure, Your Honor.

18 THE COURT: The counsel for the defense has an
19 initial matter, had brought up the issue of standing. And
20 standing as it related to redressability. Meaning, I guess
21 there are some -- currently, the allegation is that the clinic
22 is not in compliance, therefore, there is no redressability
23 even if the Court had sided with the plaintiffs. What do you
24 say to that?

25 MS. COHEN: Sure, Your Honor.

1 So plaintiff filed a rebuttal of declaration
2 yesterday from plaintiff Comprehensive Health's Regional
3 Director of Health Center Operations, Ms. Vicky Casey, that
4 explains the defendants' representations in their filing are
5 just incorrect. All of the concerns the Department of Health
6 has raised about the Columbia facility have already been
7 addressed, and the facility stands ready for a final
8 inspection and to complete the licensing process. And if it
9 would be helpful to the Court I can speak to the specific
10 issues in more detail, but all the details about the
11 completion of those outstanding issues are in the declaration.
12 So there's just no reason the license renewal process can't be
13 completed in the next couple of days if the Department of
14 Health is acting expeditiously and in good-faith as they have
15 said they are.

16 In fact, it is not unusual, Your Honor, for at least
17 in the case of abortion facilities for the license renewal
18 process to come down to the wire like this or to sometimes
19 require a final visit or something like that the day before
20 the day of a license expiration. And historically the
21 department and my clients have always managed to get the
22 renewal process done in a timely fashion.

23 THE COURT: And so is this just set on some time
24 schedule? Is it a yearly thing?

25 MS. COHEN: Correct, Your Honor. The license needs

1 to be renewed annually. And the way that process works is the
2 Department of Health comes and inspects. If there are
3 concerns they will issue a statement of deficiencies. The
4 facility submits a plan of correction and that process at
5 times under regulation can go back and forth a couple of times
6 until all outstanding issues can be resolved. Generally, the
7 process is completed with a final inspection and a final
8 approval.

9 THE COURT: Is that unique to these type of clinics?

10 MS. COHEN: No, Your Honor. That is a statewide
11 process for all healthcare facilities, correct.

12 THE COURT: Okay.

13 MS. COHEN: And so Your Honor, given that the
14 facility stands ready to complete that process and has already
15 resolved all the outstanding issues, plaintiff claim as to the
16 privilege requirement is plainly addressable, and plaintiffs
17 do need relief by Wednesday the 3rd.

18 But, Your Honor, even if the licensing process did
19 take another couple days past the 3rd, which as I've already
20 explained there is no need for it to, plaintiffs do still need
21 a temporary restraining order urgently because the Columbia
22 facility does have abortion patients scheduled again just a
23 few days later on the 9th. And so even if the process spilled
24 over for a couple of days, the TRO is still urgently needed.

25 THE COURT: Now, you would agree though there maybe

1 the issue of redressability if, in fact, it is not brought
2 into compliance. Would you agree?

3 MS. COHEN: That's correct, Your Honor, I would
4 agree with that. But as I said, the remaining issues have
5 already been addressed.

6 THE COURT: Sure. Okay.

7 I think there is a question or at least a question
8 was raised by the defense in their briefing as to the
9 plaintiff seeking this as applied relief specific to this
10 facility as opposed to this statewide facial claim that was
11 brought initially. Explain that to the Court.

12 MS. COHEN: Sure.

13 So Your Honor, the case was initially brought as a
14 facial challenge. Plaintiffs did plead in their complaint for
15 all relief just improper which the Court in the Whole Woman's
16 Health case did hold it's sufficient for the Court to enter
17 whatever relief is proper under Federal Rule of Civil
18 Procedure 54. So that has been properly pled.

19 Here, Your Honor, we are seeking as applied relief
20 for the Columbia Health Center because that is sort a discreet
21 issue that is outstanding at this time. Defendants' argument
22 that it is not proper to seek as applied relief for an
23 individual health center just does not have support in the
24 law. And in fact, this is the core way that courts routinely
25 grant relief in abortion cases. And I can give you just a

1 couple of examples, Your Honor.

2 So actually in the Whole Woman's Health case
3 initially the trial court had granted facial relief as to a
4 couple of Texas abortion restrictions. That was appealed to
5 the Fifth Circuit. The Fifth Circuit reversed in part and
6 modified in part. And the modification that the Fifth Circuit
7 did was it narrowed the injunction to an as applied injunction
8 as to only one health center in McAllen, Texas. And the
9 reason why is because it found women in that area were unduly
10 burdened, while it found that women in other areas were not.
11 The Supreme Court did ultimately reinstate the trial court's
12 facial injunction, but it took no issue with the fact that the
13 Fifth Circuit had in the interim crafted an as applied
14 injunction as to a particular health center where women were
15 burdened in a particular way.

16 Just to give another example, in Planned Parenthood
17 versus Strange, which is a case out of Alabama, that's 33 F.
18 Supp. 3d 1330. That case was also about a privileges
19 requirement and the court there granted as applied relief as
20 to three of the five abortion facilities in the state. Again,
21 finding that patients who would utilize those three facilities
22 were unduly burdened.

23 THE COURT: Just factually, what clinics would we be
24 talking about in this particular instance? And let me
25 rephrase that better.

1 MS. COHEN: Sure.

2 THE COURT: You said it's a discreet issue impacting
3 Columbia facility, correct?

4 MS. COHEN: Correct.

5 THE COURT: What other facilities would provide
6 these type of surgical abortions? There is only one other,
7 right?

8 MS. COHEN: Correct. At this time there is only one
9 other in St. Louis.

10 THE COURT: St. Louis.

11 MS. COHEN: Correct. The history here, Your Honor,
12 is that when we initially brought this case there were four
13 health centers that stood ready to provide abortion in
14 addition to the St. Louis facility.

15 THE COURT: Right.

16 MS. COHEN: What has happened since that time is a
17 variety of other restrictions have been passed by this state
18 that have prevented the other facilities from providing
19 abortions. So at this point in time, the only one that is
20 able to provide with an injunction of the privileges
21 requirement is the Columbia Health Center. The others have
22 other issues based upon new restrictions, and that's the
23 reason they are not part of this motion.

24 THE COURT: Okay. Thank you.

25 MS. COHEN: Sure.

1 And I can speak a little bit more to this as applied
2 issue. I'll give just one other case example where a court
3 has done this. It's a case out of the Eleventh Circuit, West
4 Alabama Women's Center versus Williamson, it's a very recent
5 case. It's at 900 F.3 1910. That was a different kind of
6 case in which a state band a particular method of abortion.
7 But again, the court entered an injunction as applied to two
8 of the five health centers in the state. And so this is
9 clearly something that is commonly done. I think the
10 defendants' argument that this doesn't make sense because it's
11 not the facilities right is sort of a misunderstanding of the
12 undue burden challenge. In these kinds of cases the question
13 is whether women who are served by the particular health
14 center are unduly burdened, not whether the facility is unduly
15 burdened. It's still a claim on behalf of the patients.

16 THE COURT: And you know, they bring in the question
17 to who is actually burdened by this.

18 MS. COHEN: Correct, exactly.

19 And here the group of patients who are burdened is
20 those who would seek abortions at the Columbia Health Center
21 if they were able to. But if the Health Center shuts down
22 they will be forced to travel elsewhere.

23 THE COURT: How do we show that?

24 MS. COHEN: Good question, Your Honor.

25 So as defendants concede in their brief, the large

1 fraction test is a test that applies when a plaintiff in an
2 abortion case is seeking facial relief. It does not apply to
3 an as applied challenge. Defendants are incorrect, however,
4 that on an as applied challenge plaintiffs are required to
5 show that each and every patient impacted would face an undue
6 burden.

7 The cases defendant cite to support that proposition
8 are different class of cases that are, in fact, seeking as
9 applied relief for one or just a few individuals. In a
10 situation like what we have here when the as applied relief is
11 sought for patients served by a particular health center,
12 courts have not required a showing that every single woman is
13 burdened. And we can just go through a couple of examples
14 again. So the Fifth Circuit in Whole Woman's Health when it
15 crafted that as applied injunction as to the McAllen, Texas,
16 Health Center, it did not require a showing that all women in
17 the area would be burdened. But rather the court simply
18 stated that the restriction placed a substantial obstacle in
19 the path of a woman seeking abortion because it would prevent
20 the clinic from providing abortions. And as a result, all
21 women in the area would have to travel long distances in
22 addition to facing additional practical concerns. That's the
23 findings of the court based its order upon.

24 Similarly, in the Strange case out of Alabama, the
25 court did not require a showing that every woman near the

1 relevant clinics would be burdened, but rather found that the
2 privileges requirement at issue there would eliminate abortion
3 services in three cities, Montgomery, Birmingham, and Mobile,
4 Alabama, and that the loss of services in those cities would
5 prevent some woman from obtaining abortion, would delay
6 others, and at the increased distances they would have to
7 travel it would present financial obstacles, psychological
8 obstacles, cost them unnecessary addition time and cause them
9 to lose their medical confidentiality. And so sort of these
10 generalized findings about substantial obstacle.

11 But Your Honor, I would say that even if the
12 standard were that every woman has to be burdened, the record
13 here shows that every woman who would seek abortion in the
14 Columbia area will be burdened because they will all have to
15 travel very long distances twice to seek abortion services.
16 Some woman will be prevented from doing so as a result, at
17 least 22 percent under the record here, others will be
18 delayed, but every woman who has to travel will face the
19 burdens of cost and time associated with that, logistical
20 difficulties, and potentially the loss of confidentiality that
21 comes with being forced to making these sort of arrangements
22 for that sort of travel. But again, Your Honor, that's just
23 not the test that courts have applied.

24 THE COURT: Okay. Well those were the initial
25 questions that I had up front. I'll let you continue with

1 your argument, and I think within the contents of your
2 argument there will be other questions that I may have.

3 MS. COHEN: Sure, thank you, Your Honor.

4 Your Honor, in May of 2017, this Court preliminary
5 enjoined two Missouri abortion restrictions that were nearly
6 identical to the Texas restrictions the Supreme Court struck
7 down in Whole Woman's Health as being an undue burden, because
8 neither conferred benefits sufficient to justify the burdens
9 they imposed.

10 Among the Missouri requirements previously enjoined
11 by this Court was Missouri's requirement that physicians that
12 provide abortion must have hospital-privileges within certain
13 geographic limits around a health center. Three weeks ago the
14 Eighth Circuit vacated this preliminary injunction because it
15 held that with regard to the privileges requirement this
16 Court's preliminary injunction order did not make sufficient
17 findings about the safety of abortion in Missouri and the lack
18 of benefits of the privileges requirement in Missouri, and
19 instead relied on Whole Women Health's findings.

20 As we discussed by phone last week, the Eighth
21 Circuit did not take any issue with the record that has been
22 developed in this case, but rather directed this Court to make
23 additional findings based upon that record. Plaintiffs now
24 seek a renewed temporary restraining order and preliminary
25 injunction only as to the privileges requirement and only as

1 applied to the Columbia Health Center run by plaintiff,
2 Comprehensive Health.

3 There is more than ample evidence in the robust
4 record already developed in this case for the Court to make
5 the findings required by the Eighth Circuit. And the evidence
6 in the record supports findings that the burdens the
7 privileges requirement imposes on women in the Columbia area
8 substantially outweigh it's nonexistent benefits. Not only
9 are plaintiffs, therefore, likely to succeed on their claim
10 that the privileges requirement imposes an undue burden on
11 women seeking abortion in the Columbia area, but a TRO is
12 necessary to prevent grave irreparable harm.

13 As we have already discussed, the Columbia facility
14 has abortion patients scheduled on Wednesday the 3rd. And
15 without a TRO, those women will have those appointments
16 canceled and will be prevented from exercising their
17 constitutional rights. As will plaintiffs scheduled at the
18 facility thereafter.

19 Turning to the undue burden test in the record in
20 this case, it is clear from the record that the burdens the
21 privileges requirement imposes on women seeking abortion in
22 the Columbia area substantially outweigh any benefit the
23 restriction provides. The record shows the restriction does
24 not advance the state's interest in woman's health, but will
25 prevent at least 22 percent of women in the Columbia area from

1 obtaining an abortion altogether, and will subject all other
2 women in the area to a variety of other burdens including
3 delays in accessing abortion, which increases risks to woman's
4 health, burdens associated with having to travel long
5 distances to access care, and having to make that trip twice,
6 including increased costs, difficulty arranging childcare and
7 time off work, and the associated loss of confidentiality that
8 comes with the need to make these arrangements. The record
9 also shows that these burdens fall most heavily on woman with
10 low incomes. And the record shows that over two thirds of
11 women seeking abortion in Missouri have low income. This
12 Court should, therefore, make the findings required by the
13 Eighth Circuit and find that the burdens of the privileges
14 requirement substantially outweigh its benefits.

15 Turning in more detail to the safety of abortion.
16 The Eighth Circuit's decision held that the prior preliminary
17 injunction in this case did not contain sufficient findings
18 regarding safety. But there is more than sufficient evidence
19 in the record for the Court to make the required findings.
20 And the record is clear that abortion in Missouri is extremely
21 safe, just as it is throughout the United States.

22 As plaintiffs explain in detail in their suggestions
23 in support of their motion, the record shows that every
24 reliable study in the Academic Literature, including the
25 studies relied upon by the Supreme Court in *Whole Woman's*

1 Heath, and the relevant and reliable studies cited by
2 defendants, has found that abortion is extremely safe with
3 very low rates of complication. And plaintiffs have already
4 produced in discovery in this case robust data regarding the
5 number of abortions provided at their facilities, the rare
6 complications and adverse events that have occurred, and the
7 treatment that each and every one of those patients who had a
8 complications or an adverse event received.

9 THE COURT: You know, the defense is suggesting
10 despite those national averages that Missouri far exceeds, and
11 I think they use an example of the St. Louis facility,
12 suggesting from 2012 to 2016, was six times greater than the
13 nationwide figures that are provided or at least that the
14 Court has reviewed. What do you say to that?

15 MS. COHEN: Your Honor, that six times greater
16 example is just a misrepresentation. In that specific example
17 the defendants are comparing the rate of hospital contact that
18 patients in Missouri had. So that could include going to the
19 emergency room and being released, because the patient didn't
20 require any treatment, just any hospital contact at all, to
21 the rate in the literature of patients who actually were
22 admitted to the hospital, which is a much narrower group of
23 patients who are dealing with much more serious situations.
24 So it's really just comparing apples to oranges. The overall
25 key figure here is that one of the most reliable studies, and

1 one is actually cited repeatedly by the defendants in this
2 case, is the one that the Court in Whole Woman's Health relied
3 upon. And that study contains a statistic that 2.1 percent of
4 abortions result in some sort of complication and adverse
5 event. And the data in this case provided by plaintiffs from
6 their facilities shows that the overall rate in Missouri from
7 the period from 2012 through 2016, was 0.19 percent. So it's
8 well within those national figures and well within the figures
9 cited by the Supreme Court.

10 The defendants try a number of ways to try and
11 undermine that data, but none is successful. As I've just
12 explained they slice and dice it and make misleading
13 comparisons. They, you know, make a number of arguments that
14 complications are under reported, but none of their arguments
15 actually undermine this robust data that has been submitted by
16 the plaintiffs in the case.

17 And so Your Honor, the record plainly shows that
18 abortion in Missouri is extremely safe. And there is no
19 special safety problem in Missouri that the state legislature
20 sought to cure with the privileges requirement.

21 Regarding the privileges requirements lack of
22 benefit. The evidence in the record shows that consistent
23 with the Texas requirement struck down in Whole Woman's
24 Health, Missouri's privileges requirement does nothing to
25 improve the safety of abortion or how abortion complications

1 are treated.

2 Plaintiffs' expert Dr. Eisenberg's credible
3 testimony along with other evidence in the record including
4 the recent national academy study from 2018, show that
5 hospital-privileges requirements generally and Missouri's
6 requirement just don't benefit patients' safety. And for this
7 evidence I would direct the Court to docket entries 63-1,
8 42-1, and 133-2. This is because it is extremely unlikely
9 that a patient will experience a complication requiring
10 hospitalization at all. And even when this rarely happens,
11 the fact that an abortion provider has privileges does not
12 change the quality of care the patients receive and does not
13 improve continuity of care. This is true for a variety of
14 reasons including that hospital-based physicians are able to
15 treat complications appropriately. Abortion providers in
16 Missouri already have in place processes for communication
17 with hospital-based physicians, and for that information I'd
18 refer the Court to docket entry 63-1 and 15-1, and importantly
19 because most complications following abortion do not occur
20 until after a patient has left the health center and gone
21 home. Abortion patients travel significant distances to
22 access care and that is even currently the case for the
23 Columbia Health Center given that it is only one of two
24 locations in the state. And when a patient is experiencing a
25 complication she will and should seek treatment at the

1 hospital nearest to her and she should not start traveling to
2 the hospital where her physician has privileges. And in fact,
3 could be extremely unsafe for her to do so. And the Supreme
4 Court in Whole Woman's Health recognize this very logic about
5 privileges requirements.

6 So Your Honor, the record plainly shows that
7 Missouri's privilege requirement just like the Texas
8 requirement struck down in Whole Woman's Health does not
9 benefit patients and the Court should make findings to that
10 affect as directed by the Eighth Circuit.

11 THE COURT: What would you say -- because part of
12 the defense's argument that Texas kind of they distinguish in
13 this way, suggesting that Texas entirely failed to submit
14 credible evidence in which the Court didn't rely on,
15 therefore, what it did rely on is different than what they are
16 asking the Court to rely on here. Does that make sense?

17 MS. COHEN: Yes, it does, Your Honor.

18 The evidence in the record here regardless still
19 shows that the privileges requirement does not advance patient
20 safety. Defendants make several arguments as to why the
21 requirement would have a benefit, but none is successful. And
22 I could go through some of those.

23 So the defendants argue that having privileges or a
24 transfer agreement is the standard of care. But the record
25 shows that that is just not the case for outpatient abortions.

1 The American College of Obstetricians and Gynecologist which
2 is the leading professional organization of OB/GYN's has
3 recognized that it is not the standard of care for outpatient
4 abortion for physicians to have privileges. And actually
5 oppose those sorts of requirements because they endanger
6 patients by making abortion harder to access. And in any
7 event, the Columbia facility has a transfer agreement with a
8 local hospital ensuring that it will admit and treat the
9 health center's patients when necessary.

10 Defendants also make a number of arguments that the
11 privileges requirement gives patients access to an abortion
12 provider that can treat them. But I've already explained
13 abortion patients travel from all over and seek care at
14 hospitals all over the state. And so they are not going to
15 the hospital where a physician has privileges necessarily, and
16 they shouldn't be, they should get treated near their home
17 community. The privileges requirement also doesn't require at
18 all that the abortion provider actually be the one to treat
19 the patients, it just requires that she holds privileges.

20 Another argument that the state makes is that
21 privileges improves communication and they rely upon the
22 testimony of Dr. Steele who says that he has treated abortion
23 complications and has not had communication from abortion
24 providers. But this is just one anecdotal piece of evidence
25 from one Missouri physician, and the record actually shows

1 from the testimony of the abortion providers that they do have
2 robust systems in place to communicate with emergency
3 physicians and outside providers.

4 And finally, defendants argue that the privilege
5 requirement ensures physician competency, but this is simply
6 incorrect as the Supreme Court found. And the Columbia Health
7 Center's physician, her experience demonstrates this fact. So
8 this physician holds hospital-privileges at Washington
9 University in St. Louis, a very prestigious hospital, and yet
10 she cannot maintain local privileges near the Columbia Health
11 Center. She used to have privileges at MU, but those
12 privileges were revoked because of political pressure on the
13 University from The Senate Committee for the Sanctity of Life.
14 And the hospital revoked those privileges and said
15 specifically that they had nothing to do with her competency.
16 The reasons were unrelated to her professional competency.

17 And so Your Honor, the record shows that this
18 physician competency issue is really a red herring and it's
19 just not, it's the case that privileges is a proxy for
20 competency. And that is especially so as to this narrow
21 motion as to the Columbia Health Center where the physician
22 does have privileges.

23 THE COURT: Let me -- and I'm going to change gears
24 for a second.

25 MS. COHEN: Sure.

1 THE COURT: What is the standard? Is my standard
2 the undue burden?

3 MS. COHEN: Yes, that's correct.

4 THE COURT: Now, there is a suggestion that there is
5 another standard out there if my reading is correct. Did you
6 pick up on that? Meaning if this somehow acts as a
7 substantial -- well, there was another standard that was
8 asserted by the defense, and maybe they will correct me if I
9 am wrong, as it relates to no set of -- and you have to make a
10 finding that no set of circumstances exist under which this
11 act would be valid. Did you see that?

12 MS. COHEN: Yes, Your Honor, I know what you're
13 referring to.

14 THE COURT: Yeah.

15 MS. COHEN: Your Honor, that's just not the
16 standard. The Court in Whole Woman's Health which is the most
17 recent Supreme Court case regarding abortion clearly held that
18 that is not the standard. And we are also talking about, we
19 are talking about standards for facial relief, Your Honor.

20 THE COURT: Right.

21 MS. COHEN: Which is not what we are seeking here.
22 And so there is some debate, but I do think it is clear and
23 has been settled by the Supreme Court whether in the context
24 of facial relief the standard should be no set of
25 circumstances or large fraction. The Court has spoken

1 clearly, the Supreme Court, that large fraction is in fact the
2 test for facial relief. But again, this motion seeks an as
3 applied temporary restraining order or preliminary injunction
4 and so the large fraction test does not apply here.

5 I can speak -- if it would be helpful to the Court
6 the defense does argue that the large fraction tests should
7 apply, but they also make a number of legal errors in how they
8 present that test. And so if the Court were to apply it even
9 though it doesn't apply to as applied relief, plaintiffs would
10 meet it. And so I could speak in a little more detail if it
11 would be helpful to the Court about that.

12 THE COURT: Please do.

13 MS. COHEN: Sure.

14 So Your Honor, there are few issues with defendants
15 presentation of the large fraction tests. And I would say
16 there are four key areas in how the test works legally. So
17 first of all, defendants say that the proper denominator for
18 the large fraction test here should be all women seeking
19 abortion in the state, rather than women seeking abortion at
20 the Columbia Health Center. But the Supreme Court was clear
21 in Whole Woman's Health that the proper denominator is women
22 for whom the restriction is relevant. So here, for example,
23 for women in St. Louis the privileges restriction is not
24 relevant. Physicians in St. Louis hold privileges and can
25 provide abortion. The group of women for whom the restriction

1 is relevant is women who seek abortion at the Columbia Health
2 Center. Plaintiffs have previously briefed this denominator
3 issue if it would be useful for the Court to reference that at
4 docket entry 42, starting at page 8. So defendants argue that
5 plaintiffs' expert Jason Lindo who estimates that at least 22
6 percent of women will be prevented if the Columbia Health
7 Center closes is inflated because plaintiffs are using the
8 wrong denominator. But the Supreme Court is very clear that
9 plaintiffs are using the correct denominator and that is the
10 relevant women in the Columbia area.

11 THE COURT: That's what I'm having some struggle
12 with that we're focusing on the Columbia area which consists
13 of what? I mean, for example, why wouldn't it be -- where
14 does that extend to?

15 MS. COHEN: So Your Honor, plaintiffs' expert
16 Dr. Lindo looked at women who have actually sought abortion at
17 the Columbia facility since it obtained its license following
18 the prior preliminary injunction. And so there is a map, I
19 believe, in his expert declaration that shows exactly what
20 counties in the state women have traveled from to the Columbia
21 facility. And that is the group that he is basing his
22 estimate on.

23 THE COURT: Okay.

24 MS. COHEN: Defendants are also incorrect --

25 THE COURT: -- and where is that in the record? I

1 want to be clear. Part of my thought as we look at these
2 counties, why wouldn't women of Jackson and Lafayette -- and
3 I'm assuming, maybe I'll have to see that, why wouldn't they
4 -- I don't know if they are being included within that. Is
5 that the area?

6 MS. COHEN: Right. So this document is docket entry
7 133-3, is the declaration of Jason Lindo. And Your Honor,
8 women from those other counties may well travel to Columbia.
9 This was really a conservative approach that Dr. Lindo took
10 just to look at women that actually traveled there since the
11 Columbia facility received its license in October of 2017. So
12 it is sort of a short window of time, and it may be that over
13 more time women from other counties would travel there as
14 well. But Dr. Lindo being conservative looked at only that
15 group that has done so within the past year or so. And that
16 is that group.

17 But in terms of Your Honor entering an order, I
18 don't think it would need to be limited to that specific
19 group, I think it could be, you know, the findings could be
20 based upon all women that would seek care in Columbia.

21 I want to talk about a couple other errors the state
22 makes with regard to the large fraction test. So one is
23 defendants are incorrect about what burdens are cognizable and
24 that count toward the numerator of the large fraction test.
25 Defendants essentially say that the only women that count in

1 the numerator are those that are prevented from obtaining an
2 abortion altogether. But this is just not the law. Planned
3 Parenthood versus Casey in Whole Woman's Health, Supreme Court
4 cases, as well as Eighth Circuit cases have recognized that a
5 number of different burdens are cognizable and count toward
6 the numerator. So in addition to women who are prevented from
7 accessing abortion, these cases talk about delays in accessing
8 abortion, affects on vulnerable populations, such as those
9 with the fewest financial resources, risk to patient
10 confidentiality, particularly in the contexts of domestic
11 abuse, lack of individualized attention and emotional support,
12 and exposure to antiabortion harassment. And Whole Woman's
13 Health makes clear that all these burdens need to be
14 considered together when assessing the burdens of law imposes.
15 And for that I refer you to the Whole Woman's Health decision
16 at 2298.

17 And finally, and this is a really important point,
18 Your Honor. Defendants make a legal error when they say that
19 the numerator of the large fraction needs to be the vast
20 majority or practically all women. This is just not the law,
21 Your Honor. Neither the Supreme Court nor the Eighth Circuit
22 has ever required such a showing. The Eighth Circuit decision
23 in this case didn't suggest it, and neither did the Eighth
24 Circuit decision in Jegley. And requiring a showing that
25 practically all or the vast majority of women are burdened is

1 inconsistent with the result in Whole Woman's Health. There
2 the District Court explained that it was impossible to define
3 exactly how many women in Texas may be affected and enjoined
4 the law based on a finding that a significant but ultimately
5 unknowable number of women would be burdened. And that is the
6 finding that was upheld by the Supreme Court. But Your Honor,
7 even if the proper standard were vast majority or practically
8 all plaintiffs would meet that standard because as I have
9 already explained every women in the Columbia area if the
10 Columbia Health Center were to cease providing abortion would
11 be forced to do this long distance travel twice based on a
12 variety of burdens. Women are burdened differently but each
13 and every one of them is burdened.

14 THE COURT: Okay. Counsel, let me ask a question
15 and I haven't had the opportunity yet to review and so I am
16 asking you, and then I will ask the defense to put this in
17 some context for the Court.

18 I think one of my colleagues had ruled and I don't
19 know if you -- I think maybe the defense had cited a ruling
20 from Judge Phillips. Could you talk to me about that? Are
21 you familiar with that?

22 MS. COHEN: Sure. I am, Your Honor, yes.

23 THE COURT: And tell what the issue is.

24 MS. COHEN: Sure.

25 So that case was regarding Missouri abortion

1 restriction that was put into place following the preliminary
2 injunction in this case that requires that to provide
3 medication abortion a facility must have what's called a
4 complication plan in place. And that complication plan
5 requires physicians at the facility to have -- I believe this
6 is correct, a written agreement with at least two OB/GYN's in
7 the state who have privileges. Judge Phillips analyzed this
8 requirement. She found that it did not have any benefit and
9 was very clear about that. Judge Phillips declined to enjoin
10 it because she found that the facilities at issue, Columbia
11 facility being one of them, could still provide surgical
12 abortion because the complication plan was only with regard to
13 medication abortion. So she said these women can still access
14 abortion, being surgical abortion, so they're not burdened.

15 Your Honor, frankly, I think that is a misreading of
16 the law in this case, and that it was incorrect for the Court
17 to decide that whether -- that plaintiffs only have the
18 opportunity to access one form of care. But setting that
19 aside, here Columbia facility has already been prevented by
20 this complication plan from providing medication abortion. So
21 currently provides only surgical. And if the privileges
22 requirement goes into effect, abortion services will be shut
23 down there entirely. So it's a very different situation than
24 what Judge Phillips was looking at. She was saying there is
25 still services available here.

1 THE COURT: Okay. Thank you.

2 MS. COHEN: Sure.

3 Your Honor, just as a final point regarding the
4 remaining temporary restraining order factors. The variety
5 harms the women in Columbia area will face if the Columbia
6 Health Center can no longer provide abortion are certainly
7 irreparable. And maintaining the availability of abortion at
8 the Columbia Health Center which has safely provided abortion
9 on and off for many years does not harm defendants and is in
10 the public interest. And we would otherwise rely on our
11 briefing for the remaining factors.

12 And if Your Honor has no further questions I would
13 reserve some time for rebuttal.

14 THE COURT: Sure. I have no questions at this time.
15 Counsel, Mr. Sauer.

16 MR. SAUER: Thank you, Your Honor. May it please
17 the Court? John Sauer on behalf of the state defendants in
18 this case, Attorney General Hawley and Dr. Williams.

19 It may be most helpful if I start by addressing the
20 questions that you raised when opposing counsel was talking --
21 starting with the standing question.

22 THE COURT: Sure.

23 MR. SAUER: There I think it is clearly a lack of
24 standing for any injunctive relief to be entered at this time
25 until the ordinary course of the regulatory process works it

1 way out and the Columbia facility is eligible for license on
2 the basis of, you know, regulations that are, you know,
3 unquestionably valid and aren't even challenged in this
4 particular case.

5 THE COURT: So you're suggesting if I were to find
6 favorable for the plaintiff, I would have to wait until those
7 are addressed and then issue the order?

8 MR. SAUER: I think that that is absolutely correct,
9 Your Honor.

10 And I point out that the -- what the Court was
11 dealing with here usually when one of these facilities is up
12 for relicensure, a couple months before hand there is an
13 initial inspection. If that initial inspection finds any kind
14 of deficiencies related to infection control and things of
15 that nature, the facility submits a plan of correction, and
16 usually that plan of correction is reviewed and approved and
17 then there is a second inspection.

18 THE COURT: And this applies to all these surgical
19 centers?

20 MR. SAUER: Absolutely.

21 THE COURT: And is there any uniqueness to abortion
22 clinics that is -- it seems to be some of the suggestion
23 within your briefing suggests that these kind of these
24 substandard practices as you say, you know, are they unique to
25 abortion centers, do you understand what I'm saying? Somehow

1 I get this impression from this that somehow when we come to
2 the abortion clinics these type of violations seem to be more
3 apparent there than maybe others. But I don't know.

4 MR. SAUER: That is my view, Your Honor.

5 THE COURT: Okay.

6 MR. SAUER: But no evidence has been submitted to
7 the Court in this case to my knowledge that would address the
8 health and safety records of other kinds of facilities that
9 might be useful comparables to that point. And something that
10 could be explored in discovery in this case and the state
11 probably would do that.

12 But I would point out that the specific issue that
13 raises the standing problem in this case is unique. It's
14 egregious, right? What happened was in August there was an
15 initial inspection, there were a number of deficiencies that
16 were noted, the facility submitted a plan of correction. And
17 then last Wednesday the inspectors came back to sort of make
18 sure that the plaintiff correction had been followed and
19 discovered much more grave deficiencies. The most serious of
20 them was that the suction aspiration machine itself had a tube
21 that contained to appeared to be black mold in what actually a
22 representative Plan Parenthood said, yes, that appears to be
23 mold in the tubing. In addition, the same machine, other
24 tubing in that machine had residual reddish fluid that was or
25 at least appeared to be bodily fluid. So we are talking about

1 really in many ways shocking or egregious health and safety
2 violations at this facility that were discovered as recently
3 as last Wednesday, five days ago. And so I believe the state
4 is moving promptly on this. They have already I believe
5 submitted statements of deficiency as of last Friday. I
6 believe they may have already submitted a plan of correction.
7 But Your Honor should think about the situation. The state is
8 not going to race to license a facility that has the actual
9 surgical machine that does its main business with those kinds
10 of really shocking health and safety violations. Ordinarily
11 as I understand it this process historically has taken the
12 process of submitting a simple plan of correction. Having
13 that plan of correction approved. Going forward with this
14 subsequent inspection. Historically it takes maybe anywhere
15 from four to eight weeks. I'm not exactly sure how long it
16 will take in this particular instance. We are talking about a
17 particularly disturbing finding that was made especially
18 because it was in light of the follow-up inspection where
19 usually everything is kind of taken care of. And so the
20 inspector goes in and says okay, here are all your deficiency
21 let's make sure we have them all corrected. Instead there was
22 this new deficiency that hadn't been there or hadn't been
23 determined to be there in the prior inspection. And that's
24 why we submitted a supplemental affidavit I think in the
25 evening yesterday to address their affidavit to say, hey, this

1 regulatory course of dealing has to be allowed to carry out
2 its course. But even if the Court were to get past that
3 standing issue, in other words, Ms. Cohen's representation
4 that we're going to get this all worked out in the next two
5 business days strikes me as extremely unlikely. And I don't
6 know exactly what the schedule will be, but I do anticipate
7 there will be some delay on that ordinary process works it way
8 out. And I believe the affidavit we submitted yesterday said,
9 look, we go through this process for every facility, right?
10 Not just the abortion facilities. And sometimes if you find a
11 pretty shocking or egregious violation one week before
12 relicensing happens, there can be a gap in licensure. And
13 that is an extremely reasonable position for the state to take
14 from a regulatory perspective.

15 In any event, moving onto this issue, I do want to
16 emphasize this issue. If the Court looks carefully at the
17 case law and listens to what they're asking, what they are
18 really doing is they are trying to invent a new form of relief
19 which they are calling in this case as applied relief, but it
20 really purports to be facial to essentially a ring of counties
21 in mid-Missouri. And what they're really doing is they are
22 trying to get what's good for them in the facial doctrine,
23 you know, for facial challenges, and what is good for them in
24 the as applied challenges. So, for example, presuming that
25 they were bringing what they pled which is a facial challenge

1 to have this invalidated statewide, it is absolutely
2 unquestionable that they would have to satisfy the large
3 fraction test which is a threshold showing that is clearly
4 established in all the case law.

5 THE COURT: Would you agree though or maybe you
6 wouldn't, I'm not sure. Would you agree that the large
7 fraction doesn't apply to an as applied challenged? Would you
8 agree with that?

9 MR. SAUER: I agree with that only when as applied
10 challenges defined as it is in the Supreme Court opinion in
11 Gonzales against Carhart.

12 THE COURT: Yeah, I know your argument is --

13 MR. SAUER: -- each individual patient.

14 THE COURT: Right.

15 MR. SAUER: The notion that they don't have to show
16 a large fraction test in this context I think is completely
17 unsupportable. In other words, what they are saying well,
18 we're not bringing a statewide challenge, but we are bringing
19 a challenge that would apply injunctive relief to a large
20 circle of counties in Mid-Missouri, an entire facility.
21 Keeping in mind the facility does not hold any constitutional
22 rights here. It's each individual woman who wants to use that
23 facility or any other facility in Missouri who is the holder
24 of the recognized constitutional right. And I have not read
25 the three District Court opinions that my opposing counsel

1 cited as engaging in that kind of narrow relief. I believe
2 that for them to treat that as a sort of a modified facial
3 challenge is deeply problematic in light of the authorities
4 that we have cited in our brief. But I very much doubt that
5 any of those cases said because this is an as applied
6 challenge they don't have to show that it affects a large
7 fraction of the women who are affecting that particular
8 facility. I believe that is completely unsupportable.

9 In any event, keep in mind -- on that point I would
10 just point the Court to what the U.S. Supreme Court said in
11 the Gonzales against Carhart case where it said we're not
12 going to approve a facial challenge in this context and,
13 therefore, the only way to challenge those particular
14 regulations which is the partial birth abortion ban has to be
15 done by individual patients. So in other words, they are
16 trying to invent a new challenge that kind of falls between
17 two stools, and in the process they are shopping for the
18 things in the legal doctrine that are good for them, as the
19 facial, and shopping for the things that are good for them in
20 as applied. At the very least if the Court were even to
21 entertain this notion that we could consider a facial
22 challenge for part of Missouri, they should be held to the
23 burden that meets facial challenges for statewide challenges.
24 And that is in fact the threshold showing for that is the
25 large fraction test.

1 THE COURT: Okay.

2 MR. SAUER: And really I think the reason they are
3 calling this an as applied challenges, frankly, they are aware
4 that under the current law they have no possibility of showing
5 an impact, a substantial burden of a quote, "large fraction of
6 women." So we have cited a whole series of cases on this.
7 The U.S. Supreme Court has never defined exactly what
8 constitutes a large fraction. But in the Gonzales case they
9 said that whatever a large fraction is, it is more than what
10 would be required to show in a First Amendment substantial
11 over-breadth challenge. Which as I understand it more than
12 50 percent of the statutes application. So whatever the large
13 fraction is, it's more than the more than 50 percent that we
14 require in the First Amendment contexts. And that's why the
15 Sixth Circuit at least in the Cincinnati against Taft case has
16 said, hey, a large fraction is really virtually all. And then
17 the Fifth Circuit said this last week in the June medical case
18 where they upheld Louisiana very, very similar admitting
19 privileges requirement. They said -- in that case the claim
20 was 30 percent was a large fraction. And the Fifth Circuit
21 said, whatever large fraction means, 30 percent is not enough.
22 In the Jegley case the Eighth Circuit itself said look,
23 12 percent is nowhere near enough. And we have cited two
24 other cases where there are fractions in this range. And we
25 vigorously dispute the factual basis for concluding that 22

1 percent of the woman who would otherwise get abortions at the
2 Columbia facility will be prevented under this regulation.
3 But even if it were true, it would be, you know, tens and tens
4 of percentage points lower than what they would need as a
5 matter of law to get over the large fraction hurdle. And that
6 is why they are saying to Your Honor, hey, this is an as
7 applied challenge, you don't need to make a large fraction
8 finding. I don't believe there is any Appellate Court in the
9 country that would make that determination. And for that
10 reason this Court can deny this request for injunctive relief
11 right now as a matter of law, because even their experts sort
12 of most optimistic forecast gets to 22 percent as the fraction
13 and that's really just not enough. But even if the Court were
14 to get beyond that issue, they have additional problems as
15 well which I can discuss briefly. But I don't want forestall
16 the Court's questions because I can't remember if I have
17 addressed all the ones that you have asked.

18 THE COURT: No, no. Those were initially. Now we
19 can get into more -- beyond those. Those are the questions I
20 had as related to standing and the large fraction. And so now
21 I think you can go to your other arguments.

22 MR. SAUER: Okay. Yes, Your Honor.

23 And I would just point the Court on that large
24 fraction point, point the Court to the discussion of Gonzales
25 against Carhart, point the Court to the discussion in the

1 Jegley case, point the Court to the discussion in the June
2 Medical case, point to the Court to the discussion in the
3 Sixth Circuit in the Cincinnati against Taft case.

4 THE COURT: Okay.

5 MS. COHEN: They are all cited in our briefs. All
6 of those show that this notion that there is 22 percent is a
7 large fraction is really just not going to get nearly over the
8 hurdle that the U.S. Supreme Court requires for the under
9 burden standard.

10 I would also point there is another sort of legally,
11 legally conclusive problem with their theory of this case.
12 The only burden that they allege that this particular
13 regulation imposes on women in mid-Missouri is increased
14 traveling distances, right? And they're saying all these
15 women are going to have to go the St. Louis facility. We
16 point out that that is completely counterfactual because
17 empirically women in the western half of Missouri have been
18 going to Overland Park, Kansas, and other facilities for
19 decades and decades just because of convenience reasons. But
20 even if you were to assume that, the only additional burden
21 that they postulate for these women is increased traveling
22 distances. And the problem for that is Casey itself addressed
23 a very similar situation. Ms. Cohen referred to the District
24 Court opinion in Casey. One of the regulations that was
25 upheld in Casey against Planned Parenthood was a regulation

1 that imposed increased traveling distances of approximately a
2 150 miles on I think 42 percent of the women in Missouri.
3 Keeping in mind that they are alleging that there is a
4 22 percent impact of this particular thing. And the actual
5 impact when you look at the population of Missouri as an
6 aggregate would be much narrower. And in that case all of
7 these sort of similar arguments that, well, it isn't just
8 that, that there is an extra burden on women who have limited
9 financial resources and find it more difficult to make that
10 burden. All those arguments were made and the U.S. Supreme
11 Court upheld that regulation. And that is why Whole Woman's
12 Health specifically said, we are not relying solely on
13 increased travel distances, because under Casey -- here they
14 are saying, you've got to drive an extra 100 to 120 miles from
15 Columbia to St. Louis to get an abortion. In Pennsylvania in
16 Casey, I believe, it was a 150 miles that they were talking
17 about. And Casey said, that's not enough to constitute an
18 undue burden. So Hellerstedt said, we're not relying solely
19 on increased travel distances, we're on the combination of the
20 fact that there is increased travel distances plus the Texas
21 regulations caused three-quarters of the abortion facilities
22 in the state, two-thirds, three-quarters, to shut down
23 overnight. So the real big problem there was that sort of
24 patient burden at the remaining facilities skyrocketed from
25 like 14,000 patients per year to something like 60,000 or

1 80,000 patients per year. Quadrupling or quintupling the
2 patient burden, the congestion at each of the remaining
3 facilities. And that's the factor that the U.S. Supreme
4 relied heavily on in concluding that there was an undue burden
5 in that case.

6 THE COURT: What if my travel distance -- if I have
7 to travel it several times? So what if I have to go back and
8 I don't have to means or the ability to stay. For example, if
9 there is some requirement that I have to go to that facility
10 -- isn't there some requirement in this case, where I have to
11 go to that facility 72 hours in advance to receive some
12 materials before the abortion, right? So now we have to make
13 some assumption that now we have to stay for a period of time
14 and have the resources to do so. Otherwise, we have to make a
15 travel there, travel back, travel there, and then travel back.
16 That's quite a difference. Now, we're not talking 120 miles,
17 we're talking more.

18 MR. SAUER: Probably double that.

19 THE COURT: No.

20 MR. SAUER: It's an excellent question, Your Honor.

21 THE COURT: It's saying 120, 120, 120, 120.

22 MR. SAUER: In other words two round trips as
23 opposed to one round trip?

24 THE COURT: Yes.

25 MR. SAUER: In order to comply with the state

1 separate informed consent procedure which is not challenged in
2 this case.

3 THE COURT: Correct.

4 MR. SAUER: This very issue is directly addressed by
5 Judge Burnett's opinion from Jackson County because they
6 raised this very argument in their separate challenge last
7 year to the same physician requirement. So they said, look,
8 overnight -- because the legislature in 2017 amended the
9 informed consent statute to say that a portion of the
10 information, the information like the actual medical risk of
11 the procedure must be provided by the doctor who is performing
12 the procedure. They said, because we have so few providers in
13 the state of Missouri, and our providers are not willing to
14 travel Columbia twice to do this, that then in fact is to
15 force women to take two trips. And Judge Burnett said I think
16 very accurately relying on two cases that I call Your Honor's
17 attention, Maher against Roe and Harris against McRae, the
18 issue of abortion providers scarcity is not one of the states
19 own making.

20 THE COURT: And I just want to be clear, I think we
21 have those cases down. What happen in Judge Burnett's case?

22 MR. SAUER: They sought a temporary restraining
23 order or a preliminary injunctive relief against the
24 application of requirements in Senate Bill 5 that would have
25 required -- that does require the doctor who was actually

1 performing the abortion to be the human being who actually
2 performs a portion of the informed consent process.

3 THE COURT: So the burden was on physician? So the
4 challenge was to her obligation to go -- to be there? I just
5 want to be very clear.

6 MR. SAUER: Let me put it this way, Missouri law
7 does not require a woman to make two trips. The woman can go
8 to a facility in her own community and meet with a doctor and
9 have informed consent happen there before she makes the second
10 trip. Their claim is because there are so few abortion
11 providers and because they are so busy and have so many other
12 things to do, like teaching classes at Washington University
13 Medical school and things of that nature, those doctors are
14 too busy to meet a woman in her own community. And that the
15 practical affect of that requirement is that most woman will
16 have to make two trips to whatever facility they are going to.
17 And they said, that's an undue burden, you can't do this, and
18 Judge Burnett said no. The state did not provide the scarcity
19 of abortion providers. And that is the problem that goes
20 through all of their arguments in this case, because their
21 argument is that in Columbia that no one can get privileges if
22 the hospital is in Columbia. There are tons of OB/GYN's in
23 the Columbia area. Many of them I presume have privileges
24 including Boone County Hospital. But apparently for reasons
25 that are beyond the state's control and are not created by the

1 state, few or none of them are willing to actually perform
2 abortion services. So it's a fundamental problem that is
3 running through their cases that they are attributing the
4 scarcity of abortion providers to the state. And there is no
5 evidence that supports that. And the presumption that the
6 state has somehow made qualified doctors unwilling to perform
7 abortions has no evidentiary support and contradicts what the
8 Eight Circuit said in this particular case which is that the
9 state is presumed to be acting in good faith when it
10 administers these very things. So that's a response to Your
11 Honor's question about whether or not the woman has to make
12 two trips, but it's also a deeper problem with all the
13 arguments they are making about the increased burden in this
14 case. Because the state applies a regulation, in a state, for
15 example, where there is a lot of interest among doctors to
16 perform abortions wouldn't impose essentially no burden at
17 all. Right now there's a lot of doctors in Columbia who said,
18 I'm quite open to doing that, getting hospital-privileges in
19 your local community is really not a big deal. And that is
20 what we see in the St. Louis area. There are a number of
21 doctors who are based in the St. Louis area, I believe, the
22 testimony in one of the other cases is they have a rotation of
23 I think it's like four who are frequently there and the other
24 doctors are rotating in. That none of them has a difficulty
25 getting privileges in their community.

1 And I want to take that point and turn it back to
2 the standing question that we raised at the beginning.
3 Because I pointed out that the issue of being black mold and
4 human fluid in the actual suction aspiration machine that they
5 have now admitted that they have used on patients with those
6 problems. That's the sort of issue that tends to arise when
7 you have doctors engaging in what Dr. Steele in his affidavit
8 calls itinerant surgery. In other words, if the doctor is
9 there and they are frequently present at the facility and they
10 are supervising what is going on there, it's much less likely
11 that you're going to get those kinds of health and safety
12 violations. And that's why in this particular context with
13 this regulation and throughout medicine generally, the whole
14 sort of both Missouri's regulation of medical doctors and
15 standards of care within medicine themselves push
16 responsibility to the doctor. And if in a case like this
17 where the doctor is coming in one or two days a month and the
18 entire time she is there she is performing abortions very,
19 very quickly and then leaving, you have situations like who
20 owns this process? Where does the buck stop? And when it's
21 not clear where the buck stops and especially where the buck
22 does not stop with a doctor, you have a situation where the
23 state is concerned you're getting things like black mold in
24 suction aspiration machines and things of that nature. That
25 is sort of an overarching, you know, sort of understanding of

1 how medicine functions and how medicine is regulated. And so
2 I think this addresses Ms. Cohen's point that she raised, that
3 well, you know, facilities say is not standard care to have
4 privileges in your community for people performing outpatient
5 abortions. The state's view is if that is so that is a bad
6 development in the standard of care that operates to the
7 detriment of patient safety at that is when regulation needs
8 to come in and make sure that the standard of care does not
9 develop in that negative way that would put patients at risk.

10 THE COURT: Okay.

11 MR. SAUER: I just want to address very briefly, we
12 have briefed this, Your Honor, in our brief. They say there
13 is absolutely no benefit to hospital-privileges requirement.
14 And I think our brief identifies eight discreet benefits and
15 all of which are completely noncontroversial. They certainly
16 are benefits. I think the plaintiffs really say those
17 benefits are not enough to get over to outweigh the burdens
18 that they receive. And I would just remind the Court of all
19 the cases that say this is not a 50/50 balancing. The burdens
20 have to decisively or substantially outweigh the benefits for
21 there to be an undue burden in this particular case. I will
22 just remind the Court and I think we said all this in the
23 brief, that having a doctor there in the community, with
24 privileges in the community, promotes continuity of care. As
25 Dr. William said in his affidavit we filed on Friday, that

1 doctor can travel with the patient to the hospital and treat
2 her when she is in an emergency situation. That is totally
3 different than being sent to the emergency room and be
4 subjected to, what Dr. Eisenberg himself testified in the
5 other case, could be eight hours of waiting time. In addition
6 to that, it gives access to a physician who is definitely
7 qualified to treat post-abortion complications. If that
8 abortion provider is an OB/GYN who is almost certainly going
9 to be able to treat them. Whereas, they have admitted in the
10 other case that not all ER doctors are qualified to treat
11 them, not all hospitals have an OB/GYN on staff who can
12 actually treat them. It gives you access to the physician who
13 actually performed the surgery and therefore is going to know
14 the most about where might a cervical laceration or perforated
15 uterus be, what might be causing these symptoms. And avoids
16 unnecessary treatment. Their expert Dr. Eisenberg testified
17 that there is a systematic problem of women who --

18 THE COURT: -- and part of this assumes and I
19 understand what your argument is, the frequency or the rate in
20 which these individuals might end up, correct? For example,
21 you suggest we need someone. And I think the plaintiff will
22 argue against this. But you need someone there who is a
23 trained OB/GYN, but that is assuming you are there. If my
24 complication rate for a particular procedure is less than
25 another complication rate, correct, then the time in which I

1 may spend or may spend in an emergency room is different.
2 Although what you say maybe true, but then there are some
3 arguments to that. Let's -- just as a general matter, I don't
4 know this, maybe you can tell me. With respect to those who
5 enter the emergency room or the emergency room doctor or the
6 physician who would be treating those patients, is necessarily
7 trained in treating what the injury may be, first of all. And
8 then secondly, if but for they were trained in another area
9 then somehow the success of the complication encountered by
10 the person would be different. Do you see?

11 MR. SAUER: Absolutely. And let me say three things
12 in response to that.

13 THE COURT: Sure. So respond to the one where,
14 okay, yeah, I may go to the emergency room assuming you're
15 correct. But it's one out -- and I'm just creating a number.
16 One out of every 10,000 folks, as opposed to something else
17 that is, you know, a higher risk of these complications, a
18 higher risk of me ending up in the emergency room.

19 MR. SAUER: Yeah, let me say two things in response
20 to that.

21 THE COURT: Okay.

22 MR. SAUER: So first from the state of Missouri
23 perspective, even if it is one in 10,000, that one in 10,000
24 is very important and she is entitled to the full standard of
25 care that is applied to other patients in other contexts.

1 But secondly --

2 THE COURT: -- so when you say, and I just want to
3 be clear, patients in other context. So as it relates to
4 those other surgeries or at least where the evidence suggests
5 that the complication rate maybe higher than that of surgical
6 abortions, I'm assuming all those other areas, all those
7 doctors are required to have privileges? The privileges
8 requirement, right?

9 MR. SAUER: They are required by standard care, the
10 standard of care, which regulates most of medicine. Not
11 actual express state regulations, but it is standard care in
12 comparable areas of medicine for a doctor who performs an
13 elective surgery something like an abortion to either have
14 hospital-privileges.

15 THE COURT: That's standard of care?

16 MR. SAUER: Yes, not specific state regulation.

17 THE COURT: Okay.

18 MR. SAUER: What I would submit to the Court is that
19 where there is a troubling problem of standard care -- in
20 other words in the state's view and as Dr. Williams says in
21 his affidavit what we see going on in these cases is the
22 medical community is willing to makes sacrifices to standard
23 of care in places where abortion is scarce. And the state's
24 position is that is not a trade-off that the state is willing
25 to bless or approve. And therefore, regulation needs to step

1 in to ensure that there is not a lapse in the standard of care
2 so that patient safety will not be protected.

3 THE COURT: I just want to make sure I'm following
4 this. So it's regulated at abortion clinics, but it may not
5 be regulated other places that are similar to abortion
6 clinics?

7 MR. SAUER: It is some and not in others I would
8 say.

9 THE COURT: So where is the standard of care that
10 you talk to. Where is the state of Missouri stepping in to
11 ensure that they are doing what everyone else is doing, in
12 terms of the medical field and in similar circumstances? Does
13 that make sense?

14 MR. SAUER: Absolutely, Your Honor.

15 THE COURT: Okay.

16 MR. SAUER: I think standard of care is defined as
17 broadly defined as what similarly situated, similarly trained,
18 fully qualified physicians would do in similar circumstances.

19 THE COURT: Okay.

20 MR. SAUER: Standard of care is not like a
21 regulation that is set forth somewhere. It is really a sort
22 of code of conduct of how physicians behave. When the state
23 tends to regulate, it does so and it says, hey, we really
24 don't like what physician are starting to do here. We need to
25 step in and ensure that they continue to observe best

1 practices. And so many of the authorities that the plaintiffs
2 have cited in this particular case that say, well, it's not
3 standard of care to do this in the abortion context. The
4 state's view is, yes, it appears to be at least starting to
5 not be true that this is standard care of the abortion
6 context, and that is something that the state thinks is a bad
7 development that risks patients safety, and that's why we have
8 specific regulation in the abortion context. There are other
9 context like birthing centers and things of that nature where
10 the state feels like we've got to step in and make sure that
11 we express regulation that best practices that promote patient
12 safety are being addressed.

13 THE COURT: Okay.

14 MR. SAUER: And if I may return to your initial
15 question that had to do with how frequent are these
16 complications?

17 THE COURT: Sure.

18 MR. SAUER: There I would say there is a deeply
19 troubling record here. Certainly any state that has an
20 abortion facility where abortions have been performed with
21 black mold in the suction aspiration machine is a big problem,
22 right?

23 THE COURT REPORTER: Mr. Sauer, if you could slow
24 down a little bit.

25 MR. SAUER: I'm sorry.

1 Let me just make a few points about that. And
2 obviously there has been voluminous paper filings on this.
3 First of all, the way I put this in the previous oral argument
4 in this case, and this is the way I look at it. There are
5 kind of four layers of complications. There are the
6 complications that the abortion providers know about and
7 report. So that is the situation where a woman receives an
8 abortion, suffers a post-abortion complication and returns to
9 the facility to be treated or the complication happens right
10 there at the facility. So they know about it and they report
11 it. And so that first layer of complication is what is
12 reflected in the 2012 to 2016 data that Ms. Cohen alluded to
13 that was filed with the Court, I think attached to docket 63,
14 but I'm not necessarily right about the actual ECF number.
15 And that as we argued in a five page brief that I recommend to
16 Your Honor's attention is itself deeply troubling. Because it
17 includes, for example, the notion that at the St. Louis
18 facility the failure rate for medication abortion was three
19 times the national average predicted by their own medical
20 director. I continue to insist that it is deeply troubling
21 that the rate of hospital contact that they reported was six
22 times as high as the rate of hospitalization that was reported
23 in the literature. The way they distinguished is to say,
24 well, hospital contact and hospitalization are apples and
25 oranges. As a layperson that sounds like comparing Granny

1 Smith apples to Golden Delicious apples. Someone is going to
2 a hospital after an abortion procedure something went really
3 badly or appears to have gone really badly. That's a
4 troubling figure. But that's only sort of the essential core
5 of the complications.

6 There is another layer of complications which are
7 complications that the abortion providers find out about but
8 never report. And here's something very specific to Missouri
9 and very troubling in this case. Revised statutes of Missouri
10 188.052.2 has required since 1989 that anyone who provides an
11 abortion must file an abortion report with DHSS, and anyone
12 who files a complication report must file an abortion
13 complication report with DHSS. In an emergent discovery early
14 in this case after at least 15 years, these plaintiffs have
15 never filed an abortion complication report. And that from
16 the state's perspective is deeply disturbing. And in May of
17 2017, Dr. Williams announced there would be vigorous
18 enforcement of this going forward. So for 15 years there is a
19 way the state sets in place to track abortion complications,
20 but we don't know. We don't have the evidence that we should
21 have about how frequent these complications were occurring
22 because they systematically disregarded that particular
23 reporting requirement. In fact, Dr. Eisenberg testified in
24 his deposition which we filed with the Court on Friday that he
25 knew about that requirement, but he was told by somebody else

1 before his counsel interjected and started asserting
2 attorney/client privilege, he had been told by somebody else
3 that the state wasn't going to enforce that and he didn't have
4 to follow it. But the statute doesn't say you have to file
5 these if state regulators demand it, the statute puts the
6 burden on the abortion provider to always file them. And in
7 fact, makes it a crime, a misdemeanor to not file them. And
8 yet that report requirement in Missouri alone was
9 systematically disregarded for at least 15 years. So when we
10 went back early in this case to say what is the safety records
11 of abortion in Missouri to address all these issues they are
12 saying it is so safe, let's go to the repository of records
13 that tell us that. And I believe there was something like 36
14 reports over 15 years. None of them from the plaintiffs in
15 these cases. Virtually all of them from secondary providers.
16 A woman had come to and had been treated, it wasn't the
17 abortion provider. So there is the first layer of
18 complications that we know about, and that are serious. And
19 that the best literature on this is probably the Upadhyay
20 study that both sides have cited that finds the complication
21 rate to not to be the one percent that Ms. Cohen just said at
22 the podium. But at least two percent for abortions overall.
23 Then there is the complications that never get reported but
24 are known about.

25 Then there is a third layer that all of the parties

1 agree is out there which is the abortion complications that
2 happen but we never find out about them. Because it is
3 extremely common for a woman to have an abortion, but then
4 when she has a complication afterwards to go to another
5 medical provider. And I think there was undisputed testimony
6 I think from the doctor who performs abortions in Columbia in
7 this case, that happens. That many women are reluctant to go
8 back to the abortion provider and want to go privately to
9 someone else. And in fact, sometimes and frequently won't
10 even say that the complication they're suffering is from an
11 abortion. And the best figure I can cite for Your Honor on
12 this is at the ACOG Bulletin No. 143 that both sides have
13 relied on as an authority. Which says that in the context of
14 medication abortion, studies trying to find out how often
15 women have suffered complications after medication abortion
16 where the vast majority of complications happen later, but not
17 right there at the facility, lost of follow-up rate of
18 45 percent. So that two percent figure, right, could be
19 dramatically understated. Because the various other studies
20 that come in in the range of the two percent are all under the
21 understanding that there could be of loss of follow-up as high
22 as 45 percent that you never hear back from that patient. And
23 certainly abortion facilities don't dispute that. They just
24 never hear back from them. They do not know if there are
25 complications. That's the third layer.

1 And then there is the fourth layer. The fourth
2 layer, of course, is that we have had these regulations in
3 effect for ten years since 2007 and the facilities have been
4 requiring them. The question arises that if we didn't have
5 this rigorous regulation that promotes patient safety, how
6 much higher would the complications be? So the fourth layer
7 of complications are the complications that would've occurred
8 but did not because the state of Missouri was vigorously
9 regulating this area and did everything it could to ensure
10 safety. So, for example, the St. Louis facility which is the
11 one set of data points that we have because we got them in the
12 very, very limited discovery that was permitted in early 2017.
13 That facility was a facility that was always operating, it was
14 a fully qualified surgery center. All of those doctors have
15 privileges in Barnes Jewish Hospital which is just down the
16 street and is one of the best hospitals in the United States
17 of America, and yet that facility had a troubling safety
18 occur. The state is concerned about what happens to the
19 facility that opens up that it doesn't have any kind --
20 anything like those particular safeguards and so forth. And
21 so that's why I would say the state vigorously disputes the
22 notion that this record supports conclusion that abortion is
23 totally safe and there is no need for regulation in this area.

24 THE COURT: Okay. I have two remaining questions.
25 Let me ask this, I asked this question of Ms. Cohen. I think

1 it was you who cited Judge Phillips' case.

2 MR. SAUER: I think we cited Judge Burnett's case.
3 There has been three or four lawsuits.

4 THE COURT: I know Judge Burnett on the state in
5 Jackson County, correct?

6 MR. SAUER: Right. I don't recall citing Judge
7 Phillips.

8 THE COURT: Did you know about it?

9 MR. SAUER: Yes, sir.

10 THE COURT: What did Judge Phillips say?

11 MR. SAUER: That was as Ms. Cohen said, I think she
12 got this basically right. Judge Phillips' holding was that it
13 basically was a challenge to be complication plan requirement
14 that only applied to the medication abortions.

15 THE COURT: Okay.

16 MR. SAUER: So they brought a challenge saying,
17 well, this is going to make it difficult. Because of the
18 scarcity of doctors, the alleged scarcity of doctors again.

19 THE COURT: Is that a facial challenge?

20 MR. SAUER: Yes, I believe so. Ms. Cohen will
21 correct me if I'm wrong. I think they may have tried to do it
22 as a modified facial.

23 THE COURT: When you say modified facial, that's
24 what you're suggesting here?

25 MR. SAUER: That's what I'm suggesting they're doing

1 here. I'm saying really it's a hybrid that the law does not
2 recognize between facial and as applied challenges.

3 THE COURT: And I'll ask Ms. Cohen. And if you
4 could come up.

5 MR. SAUER: But I think the holding of Judge
6 Phillips opinion was --

7 THE COURT: -- no, I'm asking you to come up. I was
8 just curious. Was that an as applied challenge or was that a
9 facial challenge?

10 MS. COHEN: Your Honor, I would have to go back and
11 look at that. I was not deeply involved in that case.

12 THE COURT: Fair enough.

13 Go ahead, Mr. Sauer.

14 MR. SAUER: I'm pretty sure it was a facial
15 challenge. But in any event, what they said, look, there was
16 a complication plan requirement that applied to only
17 medication abortion.

18 THE COURT: Okay.

19 MR. SAUER: And they said, well, look, this is going
20 to shut down medication abortion completely at the Columbia
21 facility, and the Columbia facility will only be able to
22 provide surgical abortion. And the state argued that there is
23 no constitutional right to a particular method of abortion.
24 But if you can get a first trimester abortion and surgical
25 abortion remains incredibly common and widely accepted method

1 of abortion, that doesn't even get to the level of addressing
2 someone's constitutional rights. And that was her holding.

3 THE COURT: Let me ask you this, why do you think we
4 need addition discovery other than the Court relying on the
5 record that we have? Your argument seems very much that you
6 could rest on this.

7 MR. SAUER: Let me put it this way. If the Court
8 can easily and, in fact, should deny this request for
9 injunctive relief outright as a matter of law for all the
10 reasons I have stated. And focus especially on that -- first
11 of all the standing issue is an issue. But focus on that
12 large fraction test. That large fraction test unquestionably
13 applies here and cannot possibly be satisfied because they are
14 forecasting their large fraction, the number we dispute, we
15 say it is exaggerated, but their best number is 22 percent.

16 THE COURT: Tell me again, and this is where I'm
17 having a bit of a -- as it relates to the as applied and the
18 facial challenge. And you're saying it's this modified
19 version where it is truly, judge, this is facial, therefore,
20 you should use the large -- talk to me a little bit about that
21 or explain. Help me -- slow it down a bit. I just want you
22 very clear on where you are seeing distinction. That way when
23 Ms. Cohen has the opportunity I can talk to her about that.

24 MR. SAUER: Let me put it this way. That everybody
25 agrees that you don't have a large fraction test when an

1 individual plaintiff is saying this abortion regulation is
2 unconstitutional as applied to me. Because there is no
3 numerator and dominator to compare. But in the context of
4 statewide, everybody agrees that you have to show a large
5 fraction because the U.S. Supreme Court has said it in so many
6 terms multiple times. And so has the Eighth Circuit most
7 recently in the Jegley case, right? So if you're talking
8 about, well, is this facially -- is this unconstitutional as
9 to a large category of women. What the Supreme Court says you
10 have to look at a numerator, the number of women affected.
11 And the denominator, the number of women for who the
12 regulation is relevant, and that has to be large. And the
13 Supreme Court has never said how large it has to be, but what
14 it has said in Gonzales is it's got to be more than the over
15 50 percent that we usually expect in the first amended
16 context.

17 THE COURT: And I get that aspect of it. My
18 question kind of related to -- and I think you addressed it.
19 And I can talk to Ms. Cohen, as it applies to me being
20 Columbia.

21 MR. SAUER: So in other words, we don't think you
22 should do this, but suppose Your Honor says, fine, you can
23 bring a sort of targeted challenges that affects the Columbia
24 facility and the women in the geographical territory around it
25 who seek -- the thousands of women or hundreds of women

1 whatever it is who seeks services there. So the question is
2 should you look at that and say this is just like an
3 individual plaintiff where there is clearly no numerator and
4 no denominator and, therefore, I shouldn't use large fraction
5 test. Or is this more a statewide challenge where a large
6 number of women are affected, and they are affected in
7 differential ways, and you've got to make that comparison.
8 It's obviously in the later category. I can't imagine any
9 Court saying because it is as applied and because we are only
10 considering a large subset in Missouri, we don't have to
11 engage in a large fraction analysis. I think that's why they
12 are calling this as applied challenge. Because their number
13 is too low to be a large fraction. 22 percent. We have cited
14 five different cases for the Court that all signal that
15 numbers of that range are going to be too low. So the Court
16 may -- the state's position is deny this outright as a matter
17 of law. Right? And then we will set up a discovery schedule
18 for trial on the merits. But if the Court is in anyway
19 inclined to grant it, and thinks, well, there is enough here
20 and I want to see more, the Court ought to put this motion for
21 preliminary injunction on and because of the guidance the
22 Eighth Circuit gave we ought to have substantial discovery and
23 an evidentiary hearing on this case.

24 Our principle position is as you say and correct
25 Your Honor this should be denied as a matter of law. And for

1 all the reasons we discussed in our brief. If Your Honor has
2 no further questions --

3 THE COURT: -- at this time I don't.

4 MR. SAUER: Thank you, Your Honor.

5 THE COURT: Why don't we do this, why don't we take
6 about a ten to 15 minute recess. It will give me the
7 opportunity to review my notes and get them in order. And
8 then Ms. Cohen I will give you the opportunity to reply, and
9 if I have any further questions of you, Mr. Sauer, we will
10 address them at that time.

11 (THEREUPON, a short recess was had; WHEREUPON, the following
12 proceedings were had.)

13 (Proceedings began at 11:05 AM)

14 THE COURT: Counsel, I appreciate your patience.

15 Ms. Cohen, it's your opportunity to respond or reply
16 to the argument of counsel, Mr. Sauer.

17 MS. COHEN: Thank you, Your Honor.

18 There are several points that Mr. Sauer made that
19 I'd like to respond to. I apologize if I'm jumping around a
20 little bit. I'd like to first start with this licensure
21 redressability issue. This is all covered in the declaration
22 of Ms. Casey, but I do want to point out that some of the
23 statement that counsel is making is very inflammatory and just
24 incorrect. There was no statement by anyone at the Columbia
25 Health Center that there was mold in the medical equipment.

1 No equipment using tissue was ever used on any patients. This
2 is just really inflammatory statements that are just not
3 correct. But in any event, all of these issues have already
4 been corrected as is clear from our filings with the Court and
5 there's no reason why the licensure process can't move swiftly
6 to completion. I think Mr. Sauer suggested four to eight
7 weeks to get that process completed. That seems to me to be
8 totally outside the balance of what is reasonable and is not
9 consistent with the history that has occurred with these
10 abortion facilities. When these processes have needed to be
11 done swiftly that has happened, and I'm there is no reason why
12 it cannot happen here.

13 I'm also not sure Mr. Sauer is correct the licensure
14 process would have to be 100 percent completed before this
15 Court can enter relief. Redressability requires that only
16 that there is no other impediment to relief. And the fact
17 that the licensure process needs to go through a couple of
18 more administrative steps --

19 THE COURT: -- well, wouldn't that be a pediment for
20 this Court?

21 MS. COHEN: Your Honor, the fact that the licensure
22 process just needs to be completed through a couple
23 administrative steps, Your Honor, I mean, the process is
24 already 99.9 percent completed. There has been this back and
25 forth. All of the issues have been fixed.

1 THE COURT: But do you understand that is not what
2 the Court is being represented to the Court today that
3 everything has been fixed, I don't know that representation.
4 But let's say there is 99.9 percent. The question is this, if
5 I found favorably for plaintiff and issued a TRO right now as
6 we speak administratively or however you want to characterize
7 it they still would have to resolve these complications before
8 this would take affect, correct?

9 MS. COHEN: Before the license could issue, that's
10 correct, Your Honor.

11 THE COURT: License can issue.

12 MS. COHEN: Yes.

13 THE COURT: Therefore the addressability.

14 MS. COHEN: Correct.

15 THE COURT: So we can say procedural, we can say 99
16 .9 percent, but wouldn't it actually be 100 percent before the
17 license was issued? And you had discussed with me earlier
18 until you would be -- and I asked you, is that correct, until
19 this license is issued, the question of redressability
20 wouldn't be addressed.

21 MS. COHEN: Well, Your Honor, as I've already
22 mentioned, I do think there is no reason why this process
23 can't be resolved in the next couple of days.

24 THE COURT: That may or may not be the case, but I
25 want to be clear on this very issue. I guess my position is

1 this, if I were to find favorably for the plaintiff and
2 enjoin, it is my belief as I sit here right now, that I
3 couldn't issue the Court's order until such time as that
4 facility would be licensed. It's not 99.9. That is my belief
5 unless you would suggest there is something out there that
6 would be different. I'm not talking time, I'm just saying on
7 that very point, until a license is issued.

8 MS. COHEN: I just want to clarify something, Your
9 Honor. So the privileges requirement is actually part of the
10 licensure process.

11 THE COURT: Right.

12 MS. COHEN: So it's not the case that the license
13 can't issue prior to this Court entering relief for the
14 plaintiffs. The part of the licensure process is that the
15 department has to approve either that privileges are in place
16 or if that requirement is enjoined then that is no longer part
17 of the licensing requirements. And so it is not the case that
18 the license could issue ahead of this Court's order. What
19 would have to happen is that this Court would enter a
20 temporary restraining order that would remove that requirement
21 from the licensure process, and then along with verified
22 completion of these other issues, then the license could
23 issue.

24 THE COURT: And that's what I was looking for. So
25 you are suggesting that by me enjoining would remove that

1 requirement?

2 MS. COHEN: Exactly. And the other remaining
3 pieces, as I've already mentioned and as is shown from the
4 declaration of Ms. Casey filed yesterday, the remaining pieces
5 for licensure have already been addressed. And all that
6 remains to be done is for the department to -- they said they
7 need to visit again and verify that everything has been
8 completed.

9 THE COURT: Okay.

10 MS. COHEN: And then the last final piece for the
11 licensure is privileges.

12 THE COURT: Okay.

13 MS. COHEN: So I hope that clarifies for Your Honor.

14 THE COURT: No, I think it is. So what you're
15 disgusting is, Judge, you could do what you actually said you
16 couldn't do, but we would have to wait for that last -- well,
17 that would remove the privilege requirement, and then we would
18 just have to wait to be cleared for the lack of a better word.

19 MS. COHEN: Precisely, Your Honor. I'm sorry if I
20 wasn't clear.

21 THE COURT: No, that's helpful. Thank you.

22 MS. COHEN: Yes, sure.

23 I next want to revisit this as applied versus facial
24 relief issue. I don't think I need to fully revisit this. I
25 have already explained to the Court that as applied relief for

1 a particular health centers is commonly granted in abortion
2 cases and I mentioned a few of those cases.

3 THE COURT: Let's make sure. Mention those cases
4 again.

5 MS. COHEN: Sure.

6 THE COURT: Because that's my next question. How
7 this is not -- and I wanted you to explain to the Court as I
8 talk to Mr. Sauer about kind of this as applied but really
9 masqueraded as facial and therefore the Court should use the
10 large fraction.

11 MS. COHEN: Sure. I'll just give the cites for
12 those cases again so that the Court can reference them. So
13 it's the Fifth Circuit opinion in Whole Woman's Health at 790
14 F.3d 563. Planned Parenthood versus Strange out of Alabama,
15 which is reported at 33 F. Supp 3d. 1330. And then West
16 Alabama Women's Center versus Williamson, that's an Eleventh
17 Circuit case and that's at 900 F3d. 1310.

18 THE COURT: Okay.

19 MS. COHEN: Those are just a few examples. I don't
20 think that's exhaustive list of cases in which courts have
21 done this.

22 THE COURT: Sure.

23 MS. COHEN: And so Your Honor, as I explained
24 earlier the courts in those cases did not apply the large
25 fraction test but rather looked at whether a substantial

1 obstacle was put in the place of women who would seek care at
2 the individual facilities for which as applied relief was
3 sought. And that is how courts have analyzed this sort of as
4 applied challenges.

5 Counsel for defendants talked about the Gonzales
6 case and how that court talked about how individual women
7 could bring as applied challenges. It's of course the case
8 that that is true. Individual women can certainly bring as
9 applied challenges. The Gonzales didn't foreclose other forms
10 of as applied relief. It just happened to be discussing
11 individual women. And as is demonstrated by the fact that
12 courts do this regularly, other forms of as applied relief
13 including for individual health centers is appropriate.

14 But Your Honor, even if the Court were to treat this
15 as a facial claim or a modified facial claim as Mr. Sauer is
16 putting forth and apply the large fraction test, plaintiffs
17 would meet that test. And I want to talk about a few very
18 important errors in what Mr. Sauer is saying. So Mr. Sauer
19 has latched on to this 22 percent as being the numerator that
20 plaintiffs can show. And that is just entirely incorrect.
21 Dr. Lindo's report says that at least 22 percent of women will
22 be prevented from obtaining abortions. And importantly, he
23 explains that that is a very conservative low estimate because
24 that number is based on only one trip. And the reason why is
25 he is comparing to the situation in Texas where if a woman

1 lives 100 miles or further from a health center she only has
2 to travel once. And so he explains that, in fact, a Missouri
3 the number is really going to be higher. He just can't
4 quantify it because based on his research. Because we know in
5 Missouri every woman has to travel twice, not once. And so
6 that 22 percent number is very conservative.

7 THE COURT: What do you say to the argument of Judge
8 Barnett in Jackson County with regard to the traveling, and it
9 appeared -- and counsel correct me, it seemed like there is
10 nothing that would prevent the physician from my assumption is
11 traveling to where the patient would be. You understand what
12 I'm saying?

13 MS. COHEN: I think, Your Honor, the cases are quite
14 different. So in Judge Barnett's case no health centers were
15 being shut down by this requirement. Every one was gonna stay
16 open. It is just a question of whether patients would have to
17 either the patient or the physician would have to travel to do
18 this additional informed consent.

19 THE COURT: Right.

20 MS. COHEN: Here on the other hand we are talking
21 about a health center being forced to cease providing abortion
22 services. And so the distance that women are having to travel
23 are going to be changed quite drastically, whereas in the
24 other case no health centers are gonna be shut down. And here
25 physician travel wouldn't help, because the physician can't

1 provide abortions in Columbia currently without local
2 privileges which she cannot get, her privileges were revoked.
3 And so I think the situations are very different.

4 But going back again to this 22 percent number.
5 This is critical, Your Honor, the undue burden test does not
6 ask what fraction of women are prevented from obtaining an
7 abortion, it asks what number are burdened. And as I
8 explained earlier the case law in this area including Whole
9 Woman's Health and Casey talks about a variety of burdens that
10 are cognizable and that count in that numerator. And those
11 burdens include delay, travel, loss of confidentiality, a
12 variety of burdens that I discussed that count in that
13 numerator. So that 22 percent number that Mr. Sauer is
14 holding onto, it's not the numerator here. It is
15 significantly higher than that. And we don't have -- we're
16 not able to quantify a precise number of what that is. But
17 Your Honor, we do know that all women in the Columbia area
18 will be forced to travel these long distances twice. And that
19 that does come with a variety of burdens. Mr. Sauer is
20 incorrect that we are asserting that increased travel is the
21 only burden here. I think I've talked extensively about the
22 different kinds of burdens that come into play.

23 THE COURT: Sure.

24 MS. COHEN: I just want to make sure that that is
25 clear.

1 THE COURT: Do abortion clinics do their own
2 background checks of physician, criminal background or any
3 other type of checks?

4 MS. COHEN: I believe that they do, Your Honor. And
5 I believe actually that part of the state's licensure
6 requirements for abortion facilities requires the facilities
7 to go through a privileging process, not hospital-privileging,
8 but privileging by the facility itself. And that that does
9 include drug enforcement agency, licensing, and all sorts of
10 -- a whole variety of issues. And that the state does check
11 on that as part of their annual inspection.

12 THE COURT: Okay.

13 MS. COHEN: So yes, I believe so, Your Honor.

14 THE COURT: Let me ask you and I posed this question
15 to Mr. Sauer with respect to kind of this regulation of
16 standard care. Do other areas of medicine regulate the
17 standard -- I guess my question during our discussion was and
18 I think it related to obviously privileges, but the fact that
19 the benefit of this is that doctors can travel with their
20 patient to the emergency room.

21 MS. COHEN: Right.

22 THE COURT: And the suggestion or at least to me
23 seemed to be when I ask if other areas of medicine whether it
24 is those who practice, you know, gastroenterological, are they
25 required also in similar type facilities or similar type

1 surgeries, are those comparable? My question is do they have
2 the same requirements or the standard of care that those
3 doctors who are at the abortion clinics?

4 MS. COHEN: Right. And I'm glad you asked that,
5 Your Honor. I wanted to make sure and hit that point.

6 The state of Missouri does not require that
7 physicians performing other kinds of outpatient procedures
8 have hospital-privileges. And that is true even for
9 procedures that are far less safe than outpatient abortion.
10 Including different kinds of plastic surgery, colonoscopies, a
11 whole variety of procedures that occur on an outpatient basis
12 the state does not require privileges. I think technically
13 under the licensing scheme, if a facility is providing
14 50 percent or more of surgery then they need to have
15 privileges or a transfer agreement with a hospital.

16 THE COURT: Okay.

17 MS. COHEN: Which if they have satisfied the
18 transfer agreement, they then don't need to have privileges.
19 Here Columbia has a transfer agreement, but because the state
20 of Missouri says you have to have privileges too. And that is
21 a rule that applies only to abortion providers, they still
22 can't get licensed.

23 I want to talk about something -- just you mentioned
24 travel to the ER, that they can travel with their patients.

25 THE COURT: Right.

1 MS. COHEN: It is important to remember in the
2 abortion context that the vast majority of abortion
3 complications don't occur on the spot in the abortion
4 facility. And the Supreme Court talks about this in Whole
5 Woman's Health. They occur later after a patient has already
6 gone home. And so this idea that a physician could travel
7 immediately with a patient to the ER is just not how this
8 actually plays out in practice. I just want to be clear about
9 that.

10 THE COURT: Sure.

11 MS. COHEN: And I also want to talk just a little
12 bit about Mr. Sauer's arguments regarding abortion
13 complications. We have briefed this extensively. It is all
14 in the record. Mr. Sauer's speculation that complications are
15 under reported is just that, it's speculation. He mentions,
16 you know, a number of things he says the studies methodology
17 under counts calculations. That's just not true and Dr.
18 Eisenberg has explained that multiple times in his
19 declaration. So just to take one example of why that is not
20 true, Your Honor, and if this is too much in the weeds please
21 ask me to move on. The Upadhyay study which is relied upon by
22 both sides here and is relied upon by the Supreme Court, the
23 methodology of that study was that it looked at California
24 Medicaid billing. So no matter where a patient went for care
25 in California for her complication it was captured in the

1 Medicaid billing. And so it doesn't matter if she went to
2 another provider, if she went to a hospital to get her care,
3 there was no lose to follow-up because the Medicaid billing
4 scheme contains all of that information. And when that study,
5 which everyone here agrees is reliable, looked at that data
6 and captured all of those complications, they came up with
7 that 2.1 percent figure that was cited by the Supreme Court,
8 in which the Supreme Court said shows that abortion is very
9 safe. So just to emphasize that this is all just speculation
10 by the state that these numbers are underreporting.

11 THE COURT: And I think counsel characterizes these
12 four levels of these complications.

13 MS. COHEN: Right, Your Honor. And I'll hit a
14 couple of other points here in just a second.

15 THE COURT: Okay.

16 MS. COHEN: Another one is he says that the
17 plaintiffs in this case don't know about all the complications
18 that women go missing. Dr. Eisenberg explained in his
19 declaration in this case and also in the deposition in the
20 case filed by counsel that the providers have worked really
21 hard to develop community relationships and they do feel that
22 they find out and get information from other providers. And
23 the data produced in this case does include many patients that
24 were treated elsewhere. And that information got back to the
25 providers and it was included in the data. And so there is

1 just no evidence that those patients were lost in this
2 counting process.

3 And finally, this complication reporting issue. The
4 record is clear that no one in the state, I don't know how
5 this happened, Your Honor, but the record is clear that
6 basically no one in the state was aware of this requirement.
7 No abortion providers were, no other physicians and hospitals
8 who reported. There may have been a couple who reported. But
9 in general, this was not -- people in the state were not aware
10 of this including the department who inspected these
11 facilities for years. They never asked for a complication
12 report, never pointed out, hey, you're not doing this. And so
13 the idea that the providers were just ignoring their
14 responsibilities just doesn't represent the facts, Your Honor.
15 And I would refer the Court to docket entries 83-4 and 83-5
16 for more information about this. And in any event, the fact
17 that those reports were not being submitted does not undermine
18 the accuracy of the robust data that has been submitted in
19 this case which is based upon the providers very detailed
20 tracking processes internally that they do for quality
21 insurance. Which is in fact, required by the state. And the
22 state and the licensure process approves the quality insurance
23 processes of the facilities and goes over it at every
24 inspection. And that is a very robust process, and that is
25 the data that is here in this case.

1 But the bottom line, Your Honor, is all this talk
2 about complications is really missing the point because
3 hospital-privileges by definition does not affect the
4 frequency of abortion complications. If anything, and of
5 course, plaintiffs don't agree that this is the case, if
6 anything it could potentially affect the care that a patient
7 would receive once a complication has occurred. And of
8 course, plaintiffs' position is that it does not change that
9 care, and there is no benefit. But all this talk about the
10 rate of complications that is occurring, that is just part and
11 parcel with any medical procedure. That some number of cases
12 will result in complications and privileges is just totally
13 disconnected from that. And the state sort of obfuscates that
14 fact.

15 And finally, Your Honor, I just want to hit on this
16 discovery question. I think as you noted when you were
17 discussing with Mr. Sauer, and it's clear from the arguments
18 today, the record here is very robust already. I don't know
19 what discovery in particular Mr. Sauer would seek. He hasn't
20 told us that. Specifically what information he is looking for
21 here. But plaintiffs' position is certainly that there is
22 more than enough in the record here for Your Honor to make the
23 findings that the Eighth Circuit was looking for in its
24 decision.

25 THE COURT: Okay.

1 MS. COHEN: Thank you, Your Honor.

2 THE COURT: Thank you. I appreciate it.

3 Mr. Sauer, I'm going to give you the opportunity --
4 I guess they would call this a sur-reply. Just an opportunity
5 if you want to touch on something briefly. You guys have been
6 very helpful to the Court. Mr. Sauer.

7 MR. SAUER: Thank you, Your Honor.

8 THE COURT: Well, let's take up the issue of
9 standing I think I was incorrect and Ms. Cohen corrected me
10 with respect to this Court's ruling on that particular
11 provision of privilege, if I enjoin that would remove that
12 from the requirement. So there would be no -- I guess my
13 position was that the Court could not issue unless and until
14 there was some correction of the --

15 MR. SAUER: -- I think the Court's understanding,
16 initial understanding was absolutely correct. And let me
17 recite the legal standard that we've relied on for that
18 argument.

19 THE COURT: Okay.

20 MR. SAUER: That is in the Doe against Virginia
21 Department of Police case which is cited on page 4 of our
22 brief. That a challenge to a regulation is non-redressable
23 where quote, "there exists an unchallenged independent rule,
24 policy or decision that would prevent relief even if the Court
25 were to render a favorable decision." So that is one case we

1 cited.

2 THE COURT: So you're saying notwithstanding the
3 fact that a decision made by me would enjoin the privilege.
4 You're saying I can't even go there.

5 MR. SAUER: No, I would put it this way. There are
6 two regulations that apply here.

7 THE COURT: Right.

8 MR. SAUER: One is the regulation that says you have
9 to have hospital-privileges that they are challenging.

10 THE COURT: Right.

11 MR. SAUER: Then there is the regulation that says
12 you cannot get licensed if your suction aspiration machine has
13 black mold and human tissue in it, right? Okay.

14 THE COURT: And there is some debate about that.

15 MR. SAUER: There is indeed, Your Honor. And that
16 debate gets worked out through the regulatory process. As
17 long as they cannot satisfy regulation A, because they both
18 stand as independent bar to doing what they want to do, which
19 is to perform abortions at the Columbia facility, as long as
20 they cannot satisfy regulation A, which they haven't
21 challenged here in which there is a process that is currently
22 going through to see if they can satisfy that. As long as
23 they can't satisfy A, they cannot challenge B. If you gave an
24 order today that says I'm enjoining the hospital-privileges
25 requirement for the Columbia facility, they still couldn't do

1 abortions there because they still have to go through this
2 other process, the process A, and in this case and in no case
3 have they said there is anything invalid about that regulation
4 or about that particular process.

5 THE COURT: Well, I would not have reached that
6 addressability so I can't find that because of that
7 outstanding regulation.

8 MR. SAUER: Exactly. Think of it as two
9 regulations. Both of them right now are an obstacle to them
10 doing what they want to do which is to perform abortions. And
11 the one they are bringing a constitutional challenge to is B.
12 Regulation A, says you can't get licensed anyway until you've
13 submitted a plan of correction and addressed these health and
14 safety issues. And so right now their claim is there is no
15 standing for them to seek injunctive relief as to regulation
16 B. They must complete that process and get those things
17 resolved before they get there.

18 THE COURT: And what is this issue four to eight
19 weeks. It's just what you have been told?

20 MR. SAUER: I just don't know how long that process
21 takes. I'm just saying in other cases that I've seen in
22 defending these cases. I'm litigation counsel, I really don't
23 get involved in the regulatory process.

24 THE COURT: Sure.

25 MR. SAUER: I'm just saying there is a reasonable

1 regulatory process. It's one that they have never challenged.
2 It applies not just to abortion facilities, but others and
3 they must go through that process before there is anything for
4 the Court to redress as to their separate constitutional
5 challenge.

6 THE COURT: So you would suggest to the Court,
7 Judge, if you are going to enjoin you need to take this under
8 advisement till such time that regulation -- or they have met
9 their requirements.

10 MR. SAUER: Yeah, I think they'd have to come back
11 to the Court and renew their motion with such time when they
12 get through that particular process.

13 THE COURT: Okay.

14 MR. SAUER: But even if the Court decides not to do
15 that, the only thing I would say about the various points that
16 I made, I was at the podium for a long time, speaking very
17 quickly and I apologize for that, I would just say I would go
18 to those three cases that counsel cited, and see -- I don't
19 know, those cases were not cited in their briefs. The issue
20 of the large fraction question for relief as granted as to a
21 particular facility and opposed to an individual patient.

22 THE COURT: Right.

23 MR. SAUER: And I would be astonished if those cases
24 hold that the large fraction test does not apply here. And if
25 they do you have that against what all the authorities we've

1 cited from the Eighth Circuit, from the Sixth Circuit, from
2 the Fifth Circuit applying the large fraction test.

3 And I would leave the Court with one point, in
4 Cincinnati --

5 THE COURT: -- in those cases, let me ask, were they
6 cases that were argued as applied to? Those other cases you
7 suggest would support the large fraction. Were they
8 challenged as applied to? And the Court said, well, in this
9 instance we still would use this large fraction tests?

10 MR. SAUER: Yeah, those were statewide facial
11 challenges.

12 THE COURT: They were statewide facial. Which we
13 all agree would require this large fraction?

14 MR. SAUER: Yes. And what is baffling to me is how
15 there could possibly be a rationale not to apply that in this
16 particular context where they are seeking sweeping broad
17 relief that would apply to every woman in the Columbia area
18 regardless of her individual circumstances. That is not an as
19 applied challenge in any ordinary understanding of the term.
20 So even if the Court -- our initial position is the Court
21 shouldn't even look at that. If they want to bring a facial
22 challenge, it's got to be statewide. But if they want to do
23 it for a subset of the state, at the very least they have to
24 satisfy the large fraction test.

25 And I would point out the Sixth Circuit in the case,

1 it's Cincinnati against Taft. It's cited in our brief. Said
2 that what a large fraction means is practically all. That is
3 what the Sixth Circuit said. It said what is a large
4 fraction? Well, it's not every single one, but practically
5 all. In other words a vast majority.

6 In the recent Jegley decision from the Eighth
7 Circuit when the Eighth Circuit said that 12 percent is not a
8 large fraction, they cited that opinion. The opinion that
9 says it's practically all. So the notion that like 22 percent
10 might be enough or 22 percent --

11 THE COURT: Well, that's not the only factor that
12 this Court relies on though, does it? Is that the only thing
13 I rely on?

14 MS. COHEN: I would say this, it is a threshold
15 showing. In other words, the Court doesn't even get to the
16 question of weighing the benefits against the burdens, whether
17 this constitutes a substantial obstacle or a less substantial
18 obstacle, large fraction has got to be satisfied. And you
19 don't even get to the rest of that if they don't meet the
20 large fraction requirement.

21 THE COURT: Okay. Fair enough. Give me one second,
22 counsel. I think that will conclude. And I think you've done
23 an excellent job. Ms. Cohen, did you want to say something?

24 MS. COHEN: Your Honor, I apologize, Your Honor,
25 just 30 seconds.

1 I think there is still some confusion about the
2 licensure process on just how this all has to work. And I
3 just want to make sure we are very clear. The Department of
4 Health licensure process cannot be completed until this
5 privileges issue is resolved. It's a prerequisite for
6 licensure that a facility meets the privileges requirement.
7 And so I'm not understanding Mr. Sauer's position. He's
8 saying you're going to be stuck in the circular situation
9 where you can't get licensed and you can't get the TRO either.

10 THE COURT: Is that true?

11 MR. SAUER: I think they have to show that they
12 satisfy regulation A. Now, they may be denied for license but
13 it would solely on the ground of regulation B. They have to
14 satisfy all the other regulations.

15 THE COURT: But for lack of a better -- are these
16 moving independently? Because even if they satisfy, satisfy
17 a, which is the issues that may be with the facility, they
18 still can't get licensed without satisfy B, i.e. privileges.
19 Hold on. So then if we have A and B, if A is resolved, B
20 privileges has to be resolved. So it doesn't matter when I
21 resolve B, either -- I guess my point is this, instead of this
22 Court taking this position of somehow I'm going to take this
23 under advisement and wait for this. The Court needs to either
24 deny or grant, grant or deny. And then that will take care of
25 itself and then we move forward or we don't move forward. So

1 I guess what I'm saying is I agree with -- if that is the
2 understanding, then I would have to agree with counsel,
3 Ms. Cohen, with respect -- because they are moving
4 independently. No matter what I have to render some decision
5 with respect to the one is not dependent -- and that is how I
6 was almost tying these together I think. But I think
7 independently I've got to rule on B, i.e. privileges, one way
8 or the other. Now I know I'm in the position to grant or deny
9 and do it just as soon as practicable. And I understand what
10 you're requesting sooner than later. Otherwise it doesn't
11 matter because A can be resolved and they still will be denied
12 licensing because of the privileges requirement.

13 MR. SAUER: And I think what the law says in the
14 case that we cited and numerous other cases that are in our
15 Eighth Circuit brief and the previous brief that we did on
16 this issue in this case, what the law says is if they are not
17 satisfying A, if you were to tell them now that they don't
18 need to comply with B, that would be an advisory opinion. And
19 it would be different if the state said we're not even going
20 to go through the process of A until B is resolved. But that
21 is not what the state has done. It has not done it. The
22 state is already inspecting them with the compliance with A.

23 THE COURT: Okay. I believe I am clear on the
24 position now. We will make sure we look back to the briefing
25 on that particular issue. Very instructive. Thank you,

1 counsel. That will conclude the hearing. It's been very
2 helpful for the Court, the arguments, I think you'll did an
3 excellent job. And the Court recognizes the position now,
4 well, I recognize the arguments, I should say on the standing
5 issue. And then I think certainly if the Court's position --
6 if the Court's position is denied based upon standing, then at
7 such time if I believe the argument of counsel, then at such
8 time you would renew your motion. I would assume that would
9 be the procedure. And you would probably know. But obviously
10 the Court will have had time to review and go over the issue
11 of privileges so I would imagine a ruling would be one way or
12 the other forthcoming relatively quickly. Okay.

13 Anything else for the record?

14 MR. SAUER: Not from the state, Your Honor.

15 MS. COHEN: No, Your Honor.

16 THE COURT: Okay. Thank you, both. I appreciate
17 it.

18 (THEREUPON, the following proceedings were adjourned.)

19 CERTIFICATE

20 I certify that the foregoing is a correct transcript
21 from the record of the proceedings in the above-entitled
22 matter.

23 January 16, 2019

24 /s/ Denise C. Halasey

25 Denise C. Halasey, CCR, CVR-CM, RVR
United States Court Reporter